No. 91-6646 (3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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VERL HADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether petitioner's prior acts of sexual abuse and sodomy were properly introduced in a prosecution for aggravated sexual abuse and abusive sexual contact to show that petitioner acted with the requisite specific intent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 848-854) is reported at 918 F.2d 848.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990, and a petition for rehearing was denied on September 9, 1991. The petition for a writ of certiorari was filed on Monday, December 9, 1991, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of three separate offenses involving a minor Indian child: aggravated sexual abuse, 18 U.S.C. 1153, 2241(a)(1), attempted aggravated sexual abuse, 18 U.S.C. 1153, 2241(a)(1), and abusive sexual contact, 18 U.S.C. 1153, 2244(a)(2). The district court sentenced petitioner to 30 years' imprisonment on the aggravated sexual abuse count, to be followed by a prison term of 108 months on the remaining two counts. The court of appeals affirmed. Pet. App. 848-854.

1. Petitioner was a 42-year-old grade school teacher at the Bureau of Indian Affairs School at Chilchinbeta, Arizona, within the Navajo reservation. An 11-count superseding indictment charged that petitioner committed improper sexual acts on several male victims between 1985 and 1988. The district court, accepting petitioner's claim that he would be prejudiced by raising consent as a defense to some but not all of the charges, granted petitioner's pretrial motion to sever various counts. See 4/27/89 Tr. 9. Petitioner ultimately went to trial on five counts and was convicted on three of those counts.

The evidence at trial showed that, on three occasions in 1987 and 1988, petitioner committed improper sexual acts on Amadee Roy, a 13-year-old male student. The first incident occurred in October 1987 after petitioner had taken Roy swimming in the nearby community of Kayenta. Roy testified that, although he was only 12 years old at the time, petitioner had permitted him to drive the

car home while seated on petitioner's lap. As Roy was steering the car, petitioner instructed him to pull down his pants, whereupon petitioner inserted his penis into Roy's anus. Gov't C.A. Br. 7.

The second incident occurred the next month and followed a nearly identical pattern. Petitioner took Roy swimming in Kayenta and again permitted him to drive home seated on petitioner's lap. Petitioner similarly instructed Roy to pull down his pants and Roy felt petitioner's penis become erect. This time, however, Roy got off petitioner's lap and returned to the passenger side of the car before anything further happened. Gov't C.A. Br. 7-8. The third and final incident occurred on February 1, 1988, following a class swimming trip to Kayenta. Petitioner brought Roy to his mobile home in Baby Rocks on the way back and invited him in to change his "wet socks." Once inside, petitioner gave Roy a soft drink, put a movie in the VCR, and proceeded to rub lotion on Roy's body. Petitioner then forced Roy to remove his shorts and rubbed lotion on Roy's penis. Gov't C.A. Br. 8.

The government also introduced evidence, as part of its case-in-chief, that petitioner had committed similar acts on Cory Kay in 1985. Kay was 15 years old at that time. Kay testified that petitioner had invited him to petitioner's home, where he put lotion on him in much the same manner as he did with Roy, and then proceeded to sodomize him. Kay also testified that petitioner subsequently had committed sodomy upon him on 10 or 20 occasions. Gov't C.A. Br. 9.

The district court admitted that testimony. It concluded that the testimony was relevant to "the intentions or motive that [petitioner] would have had in touching the minor children." RT IV 682. The court also determined that the evidence was not subject to exclusion under Rule 403, which requires a weighing of the probative value of the testimony against its potential for unfair prejudice or confusion. Id. at 684. The court explained that the testimony would help the jury evaluate the motives behind petitioner's actions, including his "interest in children, his willingness to help, in a sense his neighborliness or school teaching character, [and] the suggestion that the lotion involving Amadee Roy was simply a post[-]swimming skin tone." Id. at 685.

After the government closed its case-in-chief, petitioner presented several defense witnesses, and petitioner himself testified. The government then offered a rebuttal witness, Kyle Hartman, who testified concerning several instances in which petitioner had sodomized him. The sexual acts began in 1972 or 1973 when Hartman was a 10-year-old student in the fifth grade of a school at which petitioner was then a 24-year-old teacher's aid. Petitioner invited Hartman to his house for dinner, and proceeded to fondle his penis. On subsequent occasions, the last of which occurred when Hartman was a 15-year-old high school freshman, petitioner engaged Hartman in acts of sodomy. Gov't C.A. Br. 10-11.

The district court instructed the jury that the testimony of witnesses Kay and Hartman was being admitted for the limited

purpose of assisting the jury in determining petitioner's intent and motive with respect to the alleged offenses. The jurors were instructed that they could use the prior acts evidence to evaluate petitioner's intent and motive only if they first found that the evidence established beyond a reasonable doubt that petitioner had committed the acts charged in the indictment. Pet. App. 852.

2. The jury convicted petitioner on the three counts involving actual or attempted sexual acts upon Roy, but acquitted him on two other counts alleging that he had touched the penises of two other minor Indian boys. The court of appeals affirmed. Pet. App. 848-854. The court rejected petitioner's contentions that expert testimony had been improperly admitted, id. at 852-853, that the evidence was insufficient on the count charging attempted aggravated sexual abuse, id. at 853-854, and that petitioner received an improper sentence, id. at 854.

The court of appeals also held that the district court did not abuse its discretion in admitting the prior act evidence. Pet. App. 850-852. The court held that evidence that petitioner had previously abused and sodomized other children was adequately proved, was not too remote in time, and was sufficiently similar to the charged offenses to warrant its admission. Id. at 851. The court further held that the evidence of prior activities "of a sexually gratifying nature" was introduced to prove a material element in the case, because the government was required in all three counts to demonstrate that petitioner had acted with the "specific intent" of seeking sexual gratification. Ibid.

The court rejected petitioner's claim that his offer to stipulate to specific intent (in the event the jury concluded he had committed the charged acts) rendered the prior acts evidence irrelevant and unfairly prejudicial. The court explained that petitioner "cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime" and that his "choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means." Pet. App. 852. The court concluded that the prior acts evidence was "highly probative" and that, in light of the limiting jury instruction, the probative value of the evidence outweighed any danger of unfair prejudice. Ibid.

ARGUMENT

Petitioner renews his challenge to the district court's admission of the prior act evidence. He contends that the district court should have excluded that evidence, which was admissible to show his intent, because he was willing to stipulate that if he committed the charged acts, he acted with the requisite intent. This Court's recent decision in Estelle v. McGuire, 112 S. Ct. 475 (1991), resolves that issue adversely to petitioner. Further review of petitioner's otherwise fact-bound challenge is not warranted.

1. To prove the offense of abusive sexual contact, the government was obligated to show that petitioner intentionally touched the genitalia of Amadee Roy "with an intent to abuse,

humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. 2245(3) (defining "sexual contact" for purposes of 18 U.S.C. 2244). Similarly, to prove the offense of attempted aggravated sexual abuse, the government was obligated to show that petitioner acted with the specific intent of committing a sexual act when he had Roy sit on his lap while driving his car. See Pet. App. 853 (citing United States v. Beezer, 900 F.2d 177, 179 (9th Cir. 1990)).

The government's evidence that petitioner had committed prior acts of genital-touching and sodomy was plainly relevant to the material issue of petitioner's intent at the time of the alleged acts. See Fed. R. Evid. 401, 402. The evidence was not subject to exclusion under Fed. R. Evid. 404(b), because it was offered for a purpose other than "to prove the character of a person in order to show action in conformity therewith." And the district court did not abuse its discretion in concluding, under Fed. R. Evid. 403, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See generally Huddleston v. United States, 485 U.S. 681, 691-692 (1988).

Any risk that the jury might use the prior acts evidence for an improper purpose was minimized by the district court's specific limiting instructions, which explained that the prior acts were not to be considered unless the jurors first found that the evidence established beyond a reasonable doubt that petitioner had committed the acts charged. This Court has "applied in many varying contexts" the "almost invariable assumption of the law that jurors

follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206 (1987). Accord Yates v. Evatt, 111 S. Ct. 1884, 1893 (1991) (referring to the "sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given").[1]

2. Petitioner nevertheless asserts that, because he offered to stipulate to his specific intent of seeking sexual gratification in the event the jury determined that he had committed the charged acts, the district court abused its discretion in admitting the prior acts evidence. He contends (Pet. 11-19) that various lower court decisions allow a defendant to preclude admission of prior acts evidence by "affirmatively act[ing] to remove the issue of intent from the case." Pet. 13. This Court, however, recently rejected a nearly identical argument in Estelle v. McGuire, supra.

In McGuire, the respondent was convicted of murdering his infant daughter. The Ninth Circuit reversed the conviction on the ground that the district court had admitted evidence that the child had previously been battered. It reasoned that the admission of the evidence was improper "because there was no evidence linking McGuire to the prior injuries and no claim made at trial that [the

[1] Petitioner also notes (Pet. 8-9) that the prosecution cross-examined him about such facts as whether he tickled his male students, brought them to his residence, and had received a traffic citation for allowing an unauthorized minor to drive his car. The district court allowed that cross-examination as responsive to the testimony of petitioner or other defense witnesses, see Fed. R. Evid. 611(b), as specific instances of conduct probative of petitioner's truthfulness, see Fed. R. Evid. 608(b), and as impeachment by contradiction, see J. Weinstein and M. Berger, Weinstein's Evidence ¶ 607[05], at 607-76 to 607-89 (1991). Petitioner does not directly challenge those rulings.

infant] died accidentally." 112 S. Ct. at 477. This Court reversed the Ninth Circuit's decision, explaining that the lower court ruling "ignores the fact that the prosecution must prove all the elements of a criminal offense beyond a reasonable doubt." Id. at 480. The Court specifically stated that "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." Id. at 481.[2]

Thus, even assuming that there is conflicting language among lower court decisions on the issue that petitioner presents, this Court's decision in Estelle v. McGuire puts any such conflict to rest. The Court's reasoning in McGuire is virtually identical to the reasoning of the court of appeals in this case. See Pet. App. 852 (petitioner's "choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means"). Indeed, petitioner contended in the court of appeals that the panel decision was inconsistent with the Ninth Circuit's decision in McGuire. See Pet. for Reh. and Sugg. for Reh. En Banc, at 11. The Court has eliminated that inconsistency, and no further review is warranted.

[2] Although McGuire was decided as a matter of due process and overturned a writ of habeas corpus that had been granted in a state prosecution, the Court's reasoning is fully applicable to this case. Indeed, the Court based its reasoning on the fact that "[i]n the federal courts '[a] simple plea of not guilty ... puts the prosecution to its proof as to all elements of the crime charged.'" 112 S. Ct. at 481 (quoting Mathews v. United States, 485 U.S. 58, 64-65 (1988)). It found no "reason to think that the rule is different in California." Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992